File: [redacted] - Seattle

Date: OCT 2 6 1998

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaaren L. Barr, Esquire
3811 Eastern Avenue North
Seattle, Washington 98103

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Asylum, withholding of removal

In an oral decision rendered on September 12, 1997, an Immigration Judge found the respondent to be subject to removal as charged, pretermitted his application for asylum and withholding of removal, and ordered him deported to Cambodia. The appeal will be dismissed.

I. DEPORTABILITY

The respondent, a native and citizen of Cambodia, entered the United States as a refugee in 1985. His status was adjusted to that of a lawful permanent resident as of April 25, 1985.

The Immigration Judge properly admitted into evidence the record of conviction. Matter of Madrigal, Interim Decision 3274 (BIA 1996). The Second Amended Information shows that the respondent and three others were charged with murder in the first degree in Count One and murder in the second degree in Count Two in the State of Washington. The Information alleged that they caused the death of another person. The Judgment and Sentence report establishes that on March 1, 1996, in a court of the State of Washington, the respondent was convicted of Count One of manslaughter in the first degree in violation of section 9A.32.060(1) of the Revised Code of Washington. A person is guilty of manslaughter in the first degree under Washington law when he recklessly causes the death of another. The crime constitutes a felony. He was sentenced to confinement for 38 months.

We agree with the Immigration Judge that the respondent's crime constitutes a "crime of violence" under the recently amended definition of an aggravated felony in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), which applies to this case. See Illegal Immigration

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Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009-586 ("IIRIRA"); Matter of Yeung, Interim Decision 3297 (BIA 1996) (attempted manslaughter is a crime of violence); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994) (definition of crime of violence). There is no evidence of a direct appeal of the conviction, so it is final for immigration purposes. Matter of Gabryelsky, 20 I&N Dec. 750, 752 (BIA 1993).

II. WITHHOLDING OF REMOVAL

The respondent is not eligible for most forms of relief from removal due to his conviction for an aggravated felony after his admission to the United States as a lawful permanent resident. See section 208 of the Act as amended by the IIRIRA § 604(a), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1158) (asylum); section 212(h) of the Act as amended by the IIRIRA § 348, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1182) (waiver of inadmissibility); section 240A of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229b) (cancellation of removal); section 240B of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229(c)) (voluntary departure).

1. Section 241(b)(3) of the Act.

In removal proceedings, section 241(b)(3)(A) of the Act specifies that there shall be a restriction on removal to a country where an alien's life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political opinion.[1] Section 241(b)(3)(B) of the Act provides certain exceptions to the restriction. In the instant case, we are concerned with section 241(b)(3)(B)(ii) which states that an alien is ineligible for withholding if, "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." The final paragraph of section 241(b)(3)(B) states that:

> For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime. . . .

The final paragraph contains language which was not included in previous versions of the Act. Before interpreting this language, it is helpful to consider the history of the particularly serious crime bar and withholding of deportation.

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[1] This provision was added by section 305(a) of the IIRIRA, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1231(b)(3)(A)).

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2. Section 243(h) of the Act.

The statutory provision for withholding of deportation was found at section 243(h) of the Act (previously codified at 8 U.S.C. § 1253(h)).[2] It was initially specified that withholding should be denied to an alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." See section 243(h)(2)(B) of the Act.

The Board addressed the question of what would be a "particularly serious crime" in Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). In Matter of Frentescu, the Board held that in judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. See id. at 247. Further, we stated that crimes against persons are more likely to be categorized as particularly serious, but that there may be instances where crimes (or a crime) against the property will be considered to be particularly serious. Id. It was subsequently established that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the alien is a danger to the community. See Matter of K-, 20 I&N Dec. 418 (BIA 1991), aff'd Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995); see also Matter of Q-T-M-T-, Interim Decision 3300, at 11 (BIA 1996).

The Board also determined that certain crimes could be considered per se particularly serious, and therefore once the conviction was established, there was no need to proceed to an individualized examination of the crime. See Matter of Frentescu, supra, at 247. See also Hamama v. INS, 78 F.3d 233, 240 (6th Cir. 1996) (recognizing the Board's practice of finding that some crimes are inherently particularly serious); Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995) (upholding a Board decision which found that first degree manslaughter was an inherently particularly serious crime). However, the Ninth Circuit Court of Appeals questioned this practice in Beltran-Zavala v. INS, 912 F.2d 1027 (9th Cir. 1990). In that case, the Court found that section 243(h)(2)(B) of the Act did not erect per se classifications of crimes precluding immigration and nationality benefits, and that the statutory language committed the Board to an analysis of the characteristics and circumstances of the alien's conviction. See id. at 1032.

Congress amended section 243(h)(2) of the Act through the Immigration Act of 1990. See generally Matter of A-A-, 20 I&N Dec. 492 (BIA 1992). Specifically, a final sentence was added to section 243(h)(2) which stated that aggravated felonies are to be considered particularly serious crimes for the purpose of section 243(h)(2). This addition eliminated the need for an individual analysis of the underlying facts and circumstances in any case which the conviction

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[2] A more detailed history of section 243(h) of the Act is set forth in Matter of Q-T-M-T-, Interim Decision 3300, at 9-12 (BIA 1996).

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was for an aggravated felony. See Matter of C-, supra, (modifying Matter of Frentescu and its progeny in light of statutory amendment); see also Urbina-Mauricio v. INS, 989 F.2d 1085, 1088 (9th Cir. 1993) (stating that statutory amendment effectively overruled Beltran-Zavala v. INS, supra).

The next major change in the withholding law occurred with the passage of section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996). The Board considered the effects of this provision on the aggravated felony bar in Matter of Q-T-M-T-, supra. We concluded that an alien who has been convicted of an aggravated felony or felonies, and sentenced to at least 5 years of incarceration, is conclusively barred from withholding of deportation. However, an alien who was convicted of an aggravated felony or felonies, and sentenced to an aggregate of less than 5 years of incarceration, would be subject to a rebuttable presumption that he or she has been convicted of a particularly serious crime which would bar eligibility from withholding. The holding in Matter of Q-T-M-T-, was intended to apply to cases which were initiated before April 1, 1997, and were not controlled by IIRIRA.

3. Section 241(b)(3)(B) of the Act

We now address the contents of current section 241(b)(3)(B)(ii) of the Act in conjunction with the final paragraph of section 241(b)(3)(B) of the Act. The plain language of the first sentence of the final paragraph makes it clear that an alien who has been convicted of an aggravated felony (or felonies), and sentenced to at least 5 years, is barred from withholding of removal. This creates an absolute bar. Therefore, once the aggravated felony conviction and length of sentence are found to trigger the bar, no further analysis of the conviction is necessary.

This leaves the question of what standards should be used for aliens, such as the respondent, who have been convicted of an aggravated felony (or felonies), and have been sentenced to less than 5 years. We find that the Frentescu factors are still a viable framework for evaluating whether a crime is "particularly serious." We therefore will employ them in this case where a determination must be made as to the nature of the crime for the purpose of section 241(b)(3)(B) of the Act. This inquiry does not involve an examination of the respondent's family or community ties, or the risk of persecution in the alien's native country. See Ramirez-Ramos v. INS, 814 F.2d 1394, 1397-1398 (9th Cir. 1987). Further, we do not engage in a retrial of the alien's criminal case or go behind the record of conviction to redetermine the alien's innocence or guilt. See Matter of Q-T-M-T-, supra, at 20. Our review of any testimony or other evidence beyond the official records of conviction will be very limited and will focus on the underlying nature and circumstances of the crime.

4. The Respondent's Conviction

Therefore, the Immigration Judge in this case properly cited Matter of Frentescu, supra, and its factors in determining whether the respondent had committed a particularly serious crime. She concluded that the respondent had been convicted of a particularly serious crime because he was sentenced to 36 months in prison and he threatened violence with a handgun against a victim who subsequently died from the gunshot wound.

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The respondent contends that the Immigration Judge abused her discretion in holding that the respondent had been convicted of a "particularly serious crime," and thus, pretermitting his application for withholding of removal. Upon consideration of the relevant factors, the Board agrees with the Immigration Judge that the respondent's conviction is for a particularly serious crime.

Looking first to the statute under which the respondent was convicted to determine the nature of the conviction, the respondent was found guilty as previously noted of first degree manslaughter by recklessly causing the death of another. This offense contrasts with the offense of second degree manslaughter which requires only criminal negligence in causing death. See West's RCWA 9A.32.060, 9A.32.070. Therefore, he acted with a higher degree of culpability in causing the death of another even though he committed the crime without specific intent. Furthermore, at the time of the conviction, his offense was classified a Class B felony, the second most serious type of felony out of three categories of felonies under Washington law.[3] The statute under which he was convicted indicates he was convicted of a particularly serious crime.

Looking to the respondent's Judgment and Sentence, we note that the maximum term of punishment provided for the offense was 10 years with a sentencing range applicable to the respondent of 31 to 41 months based on his criminal record of no prior convictions. See West's RCWA 9.94A.310, 9.94A.320, 9.94A.360 (sentencing guidelines). We acknowledge that he received less than the one-half of the maximum due to the absence of prior convictions, but we also note that he received almost the maximum sentence that could be ordered based on his criminal record, further indicating the seriousness of his crime.

The respondent asserts that he was only 17-years-old at the time of the commission of the crime and that he should have been tried as juvenile where he would have received a sentence of less than 1 year. However, Washington law mandates 16 and 17-years-old be tried as adults if they committed first degree manslaughter (but not second degree manslaughter) because it is considered a serious violent offense. See West's RCWA 9.94A.030(31) (definition of serious violent offense); 13.04.030(e)(v)(A) (juvenile court jurisdiction). The State requirement that he be tried as an adult further indicates the particular seriousness of his crime.

The respondent further contends that the Immigration Judge committed error by considering facts contained in the documents charging the respondent with first degree murder as an adult rather than considering those facts contained in the documents relating to his conviction for first degree manslaughter. The respondent is referring to Second Amended Information and to the Certification For Determination of Probable Cause.

We find consideration of these documents by the Immigration Judge was appropriate in this case in determining the underlying circumstances of the respondent's crime. When the Judgment

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[3] It is now classified a Class A felony, the most serious felony under Washington law. See RCWA 9A.20.10(1)(b) (classification); 9A.32.060 (first degree manslaughter); 9.94A.360(2) (indicating severity of categories of felonies).

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and Sentence and the Second Amended Information are considered together, they establish that the jury found him guilty under Count 1 of the lesser included crime of first degree manslaughter rather than first degree murder. The Immigration Judge was not prejudiced by her awareness that he had been charged with a much more serious homicide. In addition, he did not challenge, either during the proceedings or on appeal, the essential facts recited in the probable cause affidavit. The probable cause affidavit is detailed in nature and sworn to by the prosecuting attorney. Moreover, the facts alleged in the probable cause affidavit are not inconsistent with his conviction for the less serious crime of first degree manslaughter. It was reasonable for the Immigration Judge to consider the probable cause affidavit in determining the underlying circumstances of the crime.

Considering the probable cause affidavit in the light most favorable to the respondent, it indicates that he was a part of a group of five gang members that ambushed and shot a fellow gang member who subsequently died. Even if he was not one of the two shooters, the nature of the conviction, the severity of the sentence, and the description of the crime establish that he was part of a group that planned to assault the victim with handguns. The jury found him to be culpable for the victim's death as the result of the ambush even if he did not pull the trigger or intend the victim to die. His conviction and sentence to confinement for more than 3 years reflects the seriousness of his participation in the commission of this violent crime. Crimes against persons are more likely to be categorized as particularly serious crimes. Matter of Frentescu, supra. Considering the totality of circumstances of the crime, we agree with the Immigration Judge that his participation in a gang related violent ambush resulting in the death of victim constitutes a particularly serious crime and bars him from applying for withholding of removal. Cf. Matter of L-S-I-, Interim Decision 3322 (BIA 1997) (alien convicted of armed robbery); Matter of Carballe, 19 I&N Dec. 357 (BIA 1986) (alien convicted of armed robbery).

The respondent contends that the Immigration Judge erred when she pretermitted his application for withholding of removal without making a specific finding that he is both convicted of a particularly serious crime and he is presently a danger to the community as required by the statute. However, as previously noted, a particularly serious crime is one that by its nature represents a danger to the community. See Urbina-Mauricio v. INS, supra; Matter of K-, supra.

The respondent contends that his constitutional right to due process was violated when he was ordered removed without an opportunity for relief from removal for having been convicted of a crime committed prior to his 18th birthday. We do not have the authority to consider constitutional challenges to the laws we administer. See Matter of C-, 20 I&N 529 (BIA 1992); Matter of Anselmo, 20 I&N Dec. 25, 30 (BIA 1989). Furthermore, we find that the Immigration Judge did not deny him a meaningful opportunity to be heard. See Liu v. Waters, 55 F.3d 421 (9th Cir. 1995) (the Board has authority to fix administratively correctable errors even when those errors are failures to follow due process).

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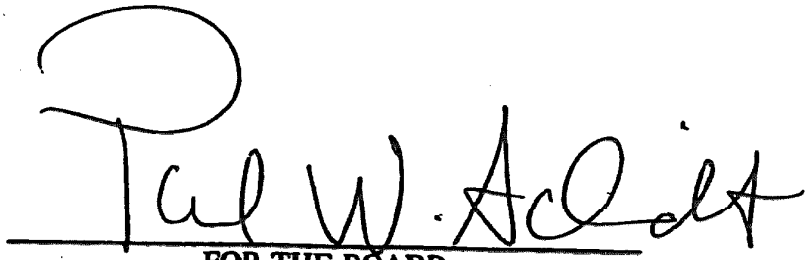
In light of the foregoing, we enter the following order.

ORDER: The appeal is dismissed.



FOR THE BOARD